IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

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No. 181

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ROBERT P. GALLOWAY, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

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**On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit**

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## PETITIONER'S REPLY BRIEF

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Respondent in its brief in opposition states that petitioner withdrew his proposed instruction number 9. (Br. 4; 5). This is absolutely contrary to the true facts and is a misstatement of the greatest possible magnitude. The denial of prayer for instruction number 9 was the principal basis of petitioner's appeal. In the Court of Appeals the respondent urged affirmance not because the prayer for instruction number 9 had been withdrawn, but because, respondent urged, the prayer had been charged in substance. (Government's Brief in Court of

Appeals, page 14) The government in its oral argument in the Court of Appeals made no assertion that the prayer had been withdrawn. The opinion of the United States Court of Appeals for the District of Columbia Circuit indicates that this is true. (Appendix to Petition, 1-a) Respondent cites page 116 of the record herein in support of its entirely new factual argument that prayer number 9 had been withdrawn. Page 116 of the record is a transcript of part of the proceedings in the trial court immediately after the Court had instructed the jury; at this time counsel for petitioner objected to the denial of such of the petitioner's prayers for instruction as had been denied by the Court. At page 116 of the record, the Court and counsel are discussing the said objection:

> The Court: Is there any other one we did deny? You withdrew some.
> Mr. Harris: Yes Sir, I withdrew 10. I remember number 10.
> The Court: And you withdrew the **Original*** 9.
> Mr. Harris: And **Substituted.***

If not carefully considered, the above portion of the record together with the new assertion of respondent, might be quite misleading. The trial Court referred to a withdrawal of a prayer for instruction which the Court denominated, "THE ORIGINAL 9." The true fact is that the first prayer number 9 was withdrawn for the purpose of substituting another and revised prayer number 9. Both the original prayer and the substituted prayer number 9 were filed in the record in the trial court. Because of the fact that the original prayer number 9 was of no importance to the appeal it was not included in the record in the Court of Appeals and was not made part of the record in this Court. In his brief in the Court of Appeals at page 15, petitioner referred to the proposed instruc-

* Emphasis supplied.

tion here in question as, "PRAYER FOR INSTRUCTION NUMBER NINE (SUBSTITUTED)" and cited page 6 of the record herein.

Aside and apart from the fact that both the "original" and the substituted prayers for instruction number 9 are contained in the record in the trial court, petitioner points out, that in the portion of the record cited by respondent, the trial Court spoke of the ORIGINAL 9 and not simply, prayer number 9. This clearly indicates that that was a prayer for instruction number nine other than the "original 9".

Respondent has, therefore, predicated its argument upon a false premise. Prayer for instruction number 9 was presented to the Court and was denied tacitly. It was not covered in the Court's charge to the jury. (R. 107-114)

The respondent argues that the Court of Appeals was correct in its holding that the evidence did not support the application of prayer number 9 of the law set forth in said prayer to this case. In his Petition in this Court at pages 15 to 17, inclusive, the petitioner demonstrated that the evidence did warrant and did require an instruction cast in the tenor of petitioner's prayer number 9.

## II.

Respondent in its brief in opposition argues (Br. 5) first that (1) the Court of Appeals did not pass upon the legal issue now presented by petitioner and (2) that the Court of Appeals for the District of Columbia Circuit is usually the court of last resort on questions of District of Columbia law. The two points of respondent's argument appear to cancel each other. Surely, the fact that the Court of Appeals makes no finding as to the law of the District of Columbia upon the point raised because of its novelty and because of its importance, should be a compelling reason why this Court should

grant certiorari. Whether or not the Court of Appeals is the Court of last resort on questions of District of Columbia law is certainly not a question to be decided herein. *Fisher* v. *United States* 328 U. S. 463, cited by respondent has no application to the question herein involved.

III.

Respondent argues in its brief in opposition that certiorari should not be granted because petitioner did not "object specifically to the self-defense instruction or to request amplification in any way before the jury retired." Petitioner submitted his prayers for instruction in writing and there followed a conference between the Court and Counsel for petitioner and respondent (which, unfortunately, was not recorded) such that counsel fully understood the feeling of the trial Court on each and every prayer. In order to protect his record it was only required of petitioner's counsel that he object to the denial of such prayers as had been either expressly or tacitly denied after the Court's charge. This was done: (R. 115)

> Mr. Harris: And for the record before I go any further, I wanted to object to the denial of such of my prayers as have been denied. I think that I am required to do that. (R. 115)

There is no question that even though the many objections of counsel for petitioner to the Court's denial of certain prayers either expressly or tacitly at the conference between the Court and counsel called for that purpose before the charge was not recorded, the objection to the denial of a written prayer is sufficient compliance with Rule 30, Federal Rules of Criminal Procedure. Petitioner says also that this is another and separate reason why certiorari should be granted in this case: the question as to whether more is required of counsel for a defendant in a criminal case after submission of a written request for instruction and an objection after conclusion

of the court's charge to the jury wherein the substance of the request is not given.

## CONCLUSION

For the reasons stated herein and for the reasons stated in the Petition, petitioner urges the issuance of a Writ of Certiorari.

Respectfully Submitted,

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